



**Libondo v Mutsami & another (Environment & Land Case 202 of 2014)  
[2023] KEELC 15696 (KLR) (21 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 15696 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT & LAND CASE 202 OF 2014  
DO OHUNGO, J  
FEBRUARY 21, 2023**

**BETWEEN**

**SILVESTER LIBONDO ALIAS PEBELE ..... PLAINTIFF**

**AND**

**FERDINAND ISESE MUTSAMI ALIAS ESESE ..... 1<sup>ST</sup> DEFENDANT**

**MACHISEMULA MUSINZI MUSONYE ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. By a plaint dated September 2, 2009, the plaintiff claimed that he was the first absolute registered owner of land parcel No Isukha/Shitochi/1971 (the suit property) measuring about 0.75 hectares and that while on a routine check at the Kakamega land registry with a view of conducting a search, the plaintiff was surprised to learn that the second defendant had obtained registration of the suit property and transferred it to the first defendant without consent. The plaintiff further averred that the defendants' actions were actuated with malice, fraudulent and aimed at disinherit the plaintiff and his family from the suit property.
2. The plaintiff therefore sought judgment against the defendants jointly for cancellation or nullification of registration of the title deed issued to the first defendant on November 12, 1997, reversion of the suit property to the plaintiff, a permanent injunction restraining the defendants, their servants and or agents and or any other representative claiming through them from interfering, alienating, evicting, wasting or in any other way interfering with the suit property; an order authorizing the Deputy Registrar of this court to execute and or sign all the necessary transfer documents in favour of the plaintiff. He further sought costs of the suit.
3. The defendants filed a defence in which they denied the plaintiff's allegations and stated that the first defendant lawfully purchased the suit property from the second defendant and as such the first defendant is a bona fide purchaser without notice and that if there are any allegations of fraud (though



denied), then the same were not known to the first defendant. The defendants further averred that the plaintiff is not entitled to the reliefs sought as the plaintiff's claim is statutorily time barred by law. They urged the court to dismiss the suit with costs.

4. The hearing of the suit commenced on March 16, 2021. Prior to that date, the plaintiff filed an application dated November 27, 2017, in which it was prayed that Silvester Libondo be substituted with Elikana Shibeka Imbosa "solely for purposes of prosecuting this matter". The application was supported by an affidavit sworn by Elikana Shibeka Imbosa in which he stated that Silvester Libondo could not attend court due to terminal illness and that Silvester Libondo Elikana had donated to him a registered power of attorney dated December 10, 2015. The application was allowed by consent on July 1, 2019.
5. Elikana Shibeka Imbosa was the sole witness during the plaintiff's case. He adopted the plaintiff's witness statement dated April 29, 2011 as well as his own witness statement dated April 29, 2011 as his evidence. The two statements are essentially a replica of each other. He stated that the plaintiff is his elder brother and that the suit property was created out of land parcel number Isukha/Shitochi/1441 which was gifted to the plaintiff by his late uncle one Andrea Kakayi Tsalwa who died in 1970. That the plaintiff obtained title to parcel Isukha/Sitochi/1441 in 1988 following petition of letters of administration in respect of the estate of Andrea Kakayi Tsalwa (deceased) and later subdivided it into three portions being title numbers Isukha/Shitochi/1971, 1972 and 1973. That the plaintiff retained the suit property to enable him to meet debts, liabilities, and final burial rites of the late Andrea Kakayi.
6. Elikana Shibeka Imbosa further stated that during the process, the second defendant who is the only child of the deceased was aware of the events and even participated in them. That the plaintiff has been in continuous occupation of the suit property from 1970 to the date of his testimony but was surprised to learn that the second defendant had fraudulently obtained registration of the suit property and thereafter transferred it to the first defendant without the plaintiff's consent. He added that he was not aware whether there was any meeting before the Assistant chief and further that the letter dated February 8, 1994 was a forgery. That the signature on the transfer is not the plaintiff's and that the plaintiff was mentally unstable. He denied that they never chased the second defendant's mother away from the suit property.
7. The plaintiff's case was then closed.
8. During defence hearing, Ferdinand Esese Mutsami testified as DW1 and adopted his witness statement. He stated that he bought the suit property from the second defendant sometime in 1994. That the plaintiff illegally subdivided the original parcel No Isukha/Shitochi/1441 and curved out the suit property herein meant for the second defendant who was the only child of the deceased and unlawfully registered himself as the owner of the suit property without the second defendant's knowledge. DW1 further stated that since he was interested in the suit property, he told the second defendant to have the suit property revert to her name and that on February 8, 1994, the second defendant called a meeting of the village elders, the plaintiff's father one Peter Imbosa Tsalwa, the second defendant's other uncles and other family members in the presence of the Assistant Chief. That the matter was deliberated on, and a written conclusion reached that the suit property should be in the second defendant's name. That pursuant thereto, the plaintiff and the second defendant agreed, signed necessary documents, and proceeded to the Land Control Board at Ikolomani, and letter of consent dated June 14, 1994 was issued. That thereafter the defendants went to the land registrar who cancelled the plaintiff's title and registered the suit property in the first defendant's name at the request of the second defendant. He added that he took immediate possession of the suit property and used it for about 10 years but was not utilising it as of the date of his testimony.



9. Machiemula Musinzi Musonye testified as DW2 and adopted her witness statement. She stated that her father passed away in 1976 and that being the only surviving child to the deceased, she made funeral arrangements by herself and that sometime later, her uncle became hostile to her mother and chased her mother from the suit property. That later, DW2 was informed that the plaintiff herein who is her cousin, was in the process of building structures in her father's parcel No Isukha/Shitochi/1441 claiming to have been gifted the parcel.
10. She added that she reported the matter to the Assistant Chief and later to the Chief of Ikolomani location where the plaintiff and her uncle Peter Imbosa Tsalwa admitted the mistake and promised both to give back the land and to stop interfering with it since DW2 was lawfully entitled to inherit her deceased father's land. That thereafter she told her cousin Jethro to help look for someone to buy the suit property and that sometime in 1994, Jethro introduced the first defendant to her after which she transferred the suit property to the first defendant after attending Ikolomani and Shinyalu Land Control Board. She urged the court to order the plaintiff to vacate the suit property to enable the first defendant use it.
11. The defence case was then closed. Parties thereafter filed and exchanged written submissions.
12. The plaintiff argued that as of the date of the land sale agreement dated June 12, 1994 between the defendants herein, he was the registered owner of the suit property and that the defendants never sought his consent during the transaction thereby rendering the agreement illegal and or fraudulent. He added that the defendants will not suffer any prejudice if the orders sought are issued since the first defendant has never acquired vacant possession or actual use of the suit property and that from the evidence on record, he is the one in possession. That the first defendant ought to be compensated by way of refund of the purchase price he allegedly paid to the second defendant who did not have any land to sell. The plaintiff therefore urged this court to allow his suit as prayed.
13. The defendants filed their submissions on November 9, 2022 and argued that the first defendant is the registered proprietor of the suit property having purchased it from the second defendant and further submitted that the plaintiff failed to meet the standard of proof for fraud as he failed to subject the documents to forensic analysis. They relied on sections 109 and 112 of the *Evidence Act* and the decision in *Kinyanjui Kamau vs George Kamau* [2015] eKLR and urged that the plaintiff's suit be dismissed with costs.
14. I have considered the parties' pleadings, evidence, and submissions. The issues that arise for determination are whether the plaintiff has established fraud and whether the reliefs sought should issue.
15. The plaintiff's case is that the second defendant obtained registration of the suit property in her name fraudulently and transferred it to the first defendant with a view to disinheriting the plaintiff and his family.
16. Fraud is a serious allegation. It is for that reason that the law requires that an allegation of fraud be pleaded, particularised, and strictly proven on a standard higher than that required in ordinary civil cases. This was restated by the Court of Appeal in *Kinyanjui Kamau v George Kamau Njoroge* [2015] eKLR as follows:

It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo v Ndolo* (2008) 1 KLR (G&F) 742 wherein the court stated that:

"...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was



making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases...” ... In cases where fraud is alleged, it is not enough to simply infer fraud from the facts. ...

17. There is no dispute that the first defendant is the registered proprietor of the suit property. As a registered proprietor, the first defendant is entitled to the privileges and benefits under section 24 of the Land Registration Act. Further, section 26 of the Act obligates the court to accept the first defendant’s certificate of title as conclusive evidence of proprietorship. Nevertheless, a title may be nullified on the ground of fraud or misrepresentation to which the registered proprietor is proved to have been a party. The said sections provide as follows:
24. Interest conferred by registration
- Subject to this Act—
- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; ...
26. Certificate of title to be held as conclusive evidence of proprietorship
- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as *prima facie* evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. ...
18. The plaintiff and the second defendant are closely related: they are cousins. Their fathers were brothers. From the evidence on record, there is no dispute that the suit property which they are haggling over is a subdivision of land parcel number Isukha/Shitochi/1441 which was owned by Andrea Kakayi Tsalwa who was the second defendant’s father who died in 1975. Andrea Kakayi Tsalwa had no son and was survived by only one child: the second defendant herein, and her mother.
19. The plaintiff contends that land parcel number Isukha/Shitochi/1441 was given to him as a gift by his uncle Andrea Kakayi Tsalwa in 1971 and that it was transferred to him after he instituted succession proceedings in respect of the estate of Andrea Kakayi Tsalwa in 1988. If it was a gift *inter vivos*, it is unclear why it was not completed by effecting transfer in the plaintiff’s favour during Andrea Kakayi Tsalwa’s lifetime. Another puzzling angle to the plaintiff’s claim to the suit property is his claim that he is entitled to it as compensation for debts, liabilities, and final burial rites of the late Andrea Kakayi. If it was given to him in 1971, why would he claim his own property as compensation? On the other hand, the second defendant contends that upon her father’s demise, her uncles chased her mother away from land parcel number Isukha/Shitochi/1441 and proceeded take it on the ground that her father had no son to inherit the land.



20. The plaintiff's claim to the suit property is inseparable from the issue of validity of his own title. If he is unable to demonstrate a valid title then he cannot simply wave his title and use it to trample upon the second defendant who is the undisputed heir of Andrea Kakayi Tsalwa, the original owner of land parcel number Isukha/Shitochi/1441. He was required to go beyond his title and prove the legality of how he acquired title to land parcel number Isukha/Shitochi/1441 and show that the acquisition was legal. The burden of proof was upon him. See *Munyu Maina v Hiram Gathiba Maina* [2013] eKLR. It is not permissible to simply infer fraud. The plaintiff totally failed to demonstrate how he acquired land parcel number Isukha/Shitochi/1441 and later subdivided it. It is astounding that in the circumstances of this case, the plaintiff now turns around and claims that the second defendant is attempting to disinherit him.
21. In view of the foregoing discourse, the plaintiff has failed to prove his allegations of fraud to the required standard. That being so, plaintiff's case is without merit and the reliefs sought cannot issue.
22. In the result, I dismiss the suit. In view of the relationship between the parties, I make no order as to costs.

**DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 21<sup>ST</sup> DAY OF FEBRUARY 2023.**

**D. O. OHUNGO**

**JUDGE**

Delivered in open court in the presence of:

No appearance for the plaintiff

Mr Okali holding brief for Mr Getanda for the defendants

Court Assistant: E. Juma

